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No. 02-1739

In the Supreme Court of the United States

WILLIE YOUNG, AKA PUNCHIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a district court from receiving additional evidence of the specific quantity of drugs attributable to a defendant, when the court of appeals has remanded for resentencing based on its finding that the district court had erred in relying on the presentence report's assessment of drug quantity.

2. Whether the Due Process Clause requires the government to establish drug quantity at sentencing by clear and convincing evidence, when the drug quantity attributable to the defendant could greatly increase his sentence under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction, but vacating his sentence and remanding (Pet. App. A1-A7) is unreported, but the judgment is noted at 233 F.3d 578 (Table). The opinion of the court of appeals affirming petitioner's sentence after remand (Pet. App. B1-B2) is unreported, but the judgment is noted at 55 Fed. Appx. 900 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2002. A petition for rehearing was denied on February 25, 2003. Pet. App. C1-C2. The petition for a writ of certiorari was filed on May 27, 2003 (following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 327 months of imprisonment, to be followed by six years of supervised release. The court of appeals affirmed the conviction but vacated the sentence and remanded for resentencing. Pet. App. A1-A7. On remand, the district court reimposed the same sentence. The court of appeals affirmed. Pet. App. B1-B2.

1. Beginning in July 1986 and lasting until June 1998, petitioner and his co-defendant, Roger Thompson, distributed drugs for the Rickey Brownlee organization, based in Opa Locka, Florida, a suburb of Miami. Petitioner also served as an enforcer for the organization. Pet. App. A2.

Both Thompson and petitioner sold drugs to Katrina Johnson, a government confidential informant who previously had purchased drugs from the Brownlee organization and who was a former girlfriend of Henry Patterson, a major Brownlee customer who also became a government informant. Gov't C.A. Br. 3.[1] During one surreptitiously tape-recorded conversation, Thompson told Johnson that he had sold Patterson ten kilograms of cocaine on one occasion and regularly sold him two kilograms of the drug about twice a month. Gov't C.A. Br. 29. (Patterson later told federal investigators

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[1] Following the citation convention used in the petition, this brief refers to petitioner's first appeal (C.A. No. 99-11566-BB) as *Young I*, and refers to his second appeal (C.A. No. 01-14806-BB) as *Young II*. Unless otherwise noted, citations to the government's court of appeals brief refer to the brief filed in the first appeal.

that these regular sales continued for a 15-month period between July 1994 and October 1995. See 5/2/01 Sent. Tr. 21, 66; *United States* v. *Thompson*, No. 97-662-CR-KMM, 6/18/99 Sent. Tr. 22-23.) The day of that conversation, Thompson sold Johnson one kilogram of cocaine, and the following month Thompson agreed to provide her with 15 kilograms of cocaine and a half-kilogram of heroin. Gov't C.A. Br. 3-4.

In May 1996, Johnson approached petitioner at a restaurant owned by Brownlee and discussed purchasing a quantity of heroin. After conferring with Brownlee, petitioner agreed to sell Johnson one ounce of heroin two days later for $6000. On the day of the transaction, Drug Enforcement Administration (DEA) agents videotaped petitioner standing outside Brownlee's restaurant with a package in his hand. Thompson arrived in a vehicle and appeared to exchange a package with petitioner before departing. Gov't C.A. Br. 4-5. Three minutes later, Johnson arrived and handed $6000 to petitioner, who departed in a car owned by Brownlee. When petitioner returned, he gave Johnson a package containing one ounce of heroin. *Id.* at 5-6. In August 1996, Johnson again met with petitioner at Brownlee's restaurant and agreed to purchase two more ounces of heroin from petitioner for $10,000. Petitioner took Johnson's purchase money, but never provided the heroin, claiming later that it had been seized by law enforcement. In December 1996, Johnson visited Thompson at his car wash and discussed with him in a recorded conversation her dealings with petitioner and her desire to purchase additional drugs. Thompson assured Johnson that he had scolded petitioner for his mistreatment of Johnson. *Id.* at 6-7. When Johnson was on her way to meet Thompson,

petitioner approached her outside the car wash and attempted to sell her drugs. *Id.* at 31.

On December 17, 1996, Thompson mistakenly gave Johnson two kilograms of cocaine when she had paid for only one. Approximately one year later, after they had determined what had happened, petitioner and Brownlee approached Johnson and demanded that she return the extra kilogram. Because Johnson feared for her safety, a DEA agent assumed her undercover role in the investigation. The agent engaged Thompson in a recorded conversation in which Thompson explained that Brownlee was the source of the cocaine and that petitioner was one of Brownlee's henchmen. Gov't C.A. Br. 8; see also 3/22/99 Trial Tr. 495, 497-498 (Thompson states petitioner accompanied Brownlee "to scare [Johnson]").

2. Petitioner was charged in two counts of an 11-count indictment with conspiring with Brownlee, Thompson, and others to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and with possessing heroin (together with Brownlee) with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court severed the trial of petitioner and Thompson from that of Brownlee and the others. The jury found petitioner guilty on the substantive heroin count and found Thompson guilty on two counts of possessing cocaine with intent to distribute it, but acquitted both of the conspiracy charge. Gov't C.A. Br. 11.

3. The Presentence Report (PSR) concluded that petitioner, as a "middleman" and "enforcer" who "served at the behest of" Brownlee, PSR ¶¶ 30-33, was responsible for the total quantity of narcotics that Brownlee's organization distributed, which the PSR estimated to be more than 50 kilograms of cocaine in addition to the heroin petitioner had sold. *Id.* ¶ 43.

Thompson's cocaine sales to Patterson accounted for the bulk of the drug quantity that the PSR attributed to the Brownlee organization. See PSR ¶¶ 11, 43. The total drug quantity yielded a base offense level of 36. PSR ¶ 43. Petitioner objected to being held responsible for anything more than the heroin he personally sold to Johnson. See Second Addendum to the Presentence Report at 1. Petitioner argued that he and Thompson were competitors who operated independently and that the government had not established that he was a co-conspirator of Thompson's such that he could be held responsible for Thompson's cocaine dealing. 6/3/99 Sent. Tr. 3-15. In response, the government argued that the PSR's calculation, which was based on the trial evidence, was reliable. The government also noted that it had evidence to establish numerous other transactions that had not been included in that calculation, including evidence that petitioner was present at the meeting at Thompson's house in July 1994 when Thompson arranged to provide Patterson with cocaine on a regular basis. *Id.* at 21. The government further stated that it would "rely upon the PS[R] which is based principally on the trial record" to establish that petitioner was responsible for at least 50 kilograms of cocaine, but that if the court had questions, the government was prepared "to present an agent [to testify] to fill in the gaps." *Id.* at 21-22.

The district court concluded that there was "overwhelming evidence" that a conspiracy existed and that petitioner, Thompson and Brownlee were participants. 6/3/99 Sent. Tr. 25. The court further found that

> [petitioner] and Thompson acted in various roles on behalf of Brownlee, either as sellers [or] distributors. In some sense, they may have even com-

> peted for some of the same customers. But they were, nevertheless, part of that same conspiracy with Brownlee at the hub—or they acted in other roles as well, [petitioner] in the role of an enforcer at times.

Id. at 25-26. The court also concluded it was "certainly foreseeable," given "the scope, * * * the length of the conspiracy, [and] the frequency of the activity within the conspiracy," that the conspiracy would distribute more than 50 kilograms of cocaine. *Id.* at 26. Accordingly, the district court adopted the PSR's sentencing calculation, which prescribed a total offense level of 36, a criminal history of IV, and a sentencing range of 262-327 months of imprisonment. After reviewing petitioner's extensive criminal history, *id.* at 41-55, the district court sentenced petitioner to the high end of the guidelines range, imposing a sentence of 327 months of imprisonment.[2]

4. The court of appeals affirmed petitioner's conviction, but vacated his sentence. Pet. App. A1-A7. The court rejected petitioner's claim that the sentencing court was foreclosed from considering Thompson's sales because petitioner had been acquitted of conspiring with Thompson to distribute drugs. It explained that "[c]onduct for which a defendant has been acquitted may be considered 'relevant conduct' for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein." *Id.* at A4 (citing *United States* v. *Watts*, 519 U.S. 148, 155-157

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[2] Petitioner's heroin distribution conviction carried an enhanced maximum term of imprisonment of 30 years under 21 U.S.C. 841(b)(1)(C), because the government gave notice pursuant to 21 U.S.C. 851 that petitioner had previously been convicted of a felony drug offense. See R. 277.

(1997) (per curiam), and *United States* v. *Averi*, 922 F.2d 765, 766 (11th Cir. 1991)). The court concluded that the district court "did not err in holding [petitioner] responsible for Thompson's course of dealings with [the] informant Patterson," noting that "in addition to distributing heroin for Brownlee, [petitioner] served as his enforcer. In that capacity, and as the district court found, he knew about Thompson's activities, which included (according to Thompson in a recorded conversation) the distribution of multiple kilograms of cocaine to Patterson each month." Pet. App. A5.

The court of appeals nevertheless vacated petitioner's sentence, holding that the court had "failed to make the appropriate factual finding concerning Thompson's activity." Pet. App. A4. Although the PSR stated that Thompson sold Patterson "'multiple kilos' of cocaine twice a month," petitioner objected to that statement, and the government had offered no evidence "either at trial or at sentencing" to specify how much was sold per month. *Id.* at A5. The court acknowledged that the government had presented the testimony of DEA Agent Robert Barrett at Thompson's sentencing hearing that "Thompson sold Patterson about 'two' kilograms of cocaine twice a month," but noted that "Barrett's testimony was not before the court at [petitioner's] sentencing hearing" (*id.* at A6), which had taken place two weeks earlier. The court accordingly vacated petitioner's sentence and remanded for resentencing, "at which time appropriate findings may be made—regarding the quantity of drugs Thompson trafficked and for which [petitioner] should be held accountable—and [petitioner] can be afforded an opportunity to object thereto." *Id.* at A4.

5. On remand, the district court rejected petitioner's argument that the court of appeals' remand order did not permit the taking of additional evidence, but only permitted additional fact finding on the existing record. 5/2/01 Sent. Tr. 8-10. The district court noted that there was "ample, ample evidence in the record at the trial" to support the conclusion that petitioner was responsible for the distribution of 50 kilograms of cocaine (*id.* at 10), but permitted the government to introduce the transcript of Agent Barrett's testimony at Thompson's sentencing hearing, to which the court of appeals had referred in its opinion. Petitioner then examined Barrett extensively about his prior testimony. Agent Barrett reiterated his testimony that Thompson sold Patterson approximately four kilograms of cocaine per month. *Id.* at 31-33. Barrett estimated that Thompson sold Patterson a total of 70 kilograms of cocaine. *Id.* at 66, 85. Agent Barrett also testified that Patterson once accompanied petitioner when petitioner distributed heroin and collected $17,000 in return (*id.* at 72), and that petitioner offered on behalf of the Brownlee organization to supply Patterson with 75 kilograms of cocaine. *Ibid.* Petitioner declined to call witnesses of his own, although the court continued the hearing once to permit him an opportunity to do so. Petitioner also declined to examine Patterson, whom the government had made available for the hearing. See *id.* at 89; 8/14/01 Sent. Tr. 2. The district court commented that "it's inescapable" that petitioner was "accountable for more than 50 kilograms" of cocaine (5/2/01 Sent. Tr. 11), and reimposed the original sentence. 8/14/01 Sent. Tr. 12-13.

6. The court of appeals affirmed. Pet. App. B1-B2. The court summarily rejected petitioner's claims that due process required proof by clear and convincing

evidence to justify sentence enhancements that greatly increase a defendant's sentence (Pet. C.A. Br. 27-35 (*Young II*)), that the government had not met its burden of proof in establishing the drug quantity attributed to him (*id.* at 42-50), and that petitioner should not be held responsible for Thompson's cocaine sales because they were not within the scope of jointly undertaken activity (*id.* at 35-42). The court of appeals also rejected petitioner's claim that the government should not have been permitted to supplement the record on the specific quantity of cocaine attributable to petitioner.[3] The court affirmed, stating that "the district court, on remand, clearly complied with our earlier mandate and the record does not support [petitioner's] argument that the government got a 'second bite' at the apple." Pet. App. B2.

ARGUMENT

1. For the first time in any court, petitioner argues (Pet. 7-11) that his resentencing violated the Double Jeopardy Clause and denied him due process of law because the government was permitted "a second bite at the apple" (Pet. 8, 11; see also Pet. 7, 10) when the district court allowed the government to introduce additional evidence at sentencing on remand. That contention does not merit further review.[4]

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[3] Petitioner initially did not challenge the district court's decision on remand to receive additional evidence. After briefing on the issues raised by petitioner was complete, the court of appeals ordered supplemental letter briefs on that issue. See Letter from Thomas K. Kahn, Clerk, United States Court of Appeals for the Eleventh Circuit, to counsel and parties, *United States* v. *Willie Young*, No. 01-14806-BB, at 1 (Sept. 11, 2002).

[4] In briefing before the court of appeals, petitioner invoked neither the Double Jeopardy Clause nor the Due Process Clause in

a. This Court has never applied the Double Jeopardy Clause to noncapital sentencing proceedings. See *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) ("neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support" application of Double Jeopardy Clause to noncapital sentencing). Relying on *Burks* v. *United States*, 437 U.S. 1 (1978), where this Court held that the Double Jeopardy Clause prohibits the retrial of a criminal defendant after his conviction is reversed on appeal for insufficient evidence, petitioner asks this Court to extend double jeopardy principles to sentencing proceedings. Pet. 8. This Court, however, has already concluded that *Burks* is "inapt" when a "failure of proof occurs in a sentencing proceeding," *Monge* v. *California*, 524 U.S. 721, 729 (1998), because "[t]he pronouncement of sentence simply does not 'have the qualities of constitutional finality that attend an acquittal.'" *Ibid.* (quoting *DiFrancesco*, 449 U.S. at 134). In *Monge*, the defendant argued that the Double Jeopardy Clause barred the State from having a second opportunity to prove his prior conviction for purposes of applying a provision of California's Three Strikes Law that resulted in the doubling of his term of imprisonment. The *Monge*

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contending that the district court had erred in receiving additional evidence. Petitioner instead argued that taking additional evidence violated the scope of the court of appeals' mandate and was contrary to the law of the case. See Pet. Supp. C.A. Br. 2-5 (*Young II*). Review of his current constitutional claim should be declined for that reason alone. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

Court held that the Double Jeopardy Clause does not "extend[] to noncapital sentencing proceedings." *Id.* at 724. Petitioner offers no reason to revisit that settled rule.[5]

Petitioner also invokes the Due Process Clause in passing (Pet. 11), but does not explain why it would offer protection that the most pertinent constitutional provision does not. This Court has expressly rejected the notion that "the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 116 (2003).[6] See generally *Medina* v. *California*, 505 U.S. 437, 443 (1992).

b. Petitioner contends (Pet. 9) that the courts of appeals are in conflict on whether the government may present additional evidence on remand after a finding of insufficient evidence to support a sentencing enhancement. He asks the Court to grant certiorari and to establish a rule that district courts may not permit the introduction of additional evidence on remand.

Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is re-

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[5] The drug quantity findings in this case did not extend petitioner's statutory maximum prison term, but merely resulted in an increase in his sentence under the Sentencing Guidelines *within* the statutory maximum term. See p. 6 & n.2, *supra*. Thus, this case raises no issue about the application of the Double Jeopardy Clause to a failure of proof on a fact that does raise the maximum sentence. Cf. *Monge*, 524 U.S. at 741 (Scalia, J., dissenting).

[6] Moreover, because petitioner did not mention the Due Process Clause in his question presented, see Pet. i, it appears he has not adequately presented the issue for review. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

viewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals, 18 U.S.C. 3742, provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1), (2)(A), and (2)(B). It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing, and that the district court is obligated to follow the directions of the court of appeals when conducting the resentencing.

The courts of appeals have taken various approaches to the question whether, when the mandate is silent about the scope of remand, the district court is limited

in resentencing to the evidentiary record of the initial sentencing or can receive additional evidence on remand. Most courts of appeals that have considered the issue presumptively permit the receipt of additional evidence on remand, at least for those issues that are the subject of the remand order. See *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) ("Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing," subject to "any limitations imposed on its function at resentencing by the appellate court"); *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (following *Cornelius*); *Bell*, 5 F.3d at 66-67 (following *Cornelius*); see also *United States* v. *Matthews*, 278 F.3d 880, 885-886 (9th Cir.) (en banc) ("as a general matter, if a district court errs in sentencing, we will remand for resentencing * * * without limitation on the evidence that the district court may consider" in order to "allow[] for the fullest development of the evidence relevant to a just sentence"), cert. denied, 535 U.S. 1120 (2002).[7] The Third Circuit has adopted a rule presumptively limiting the record on remand to the evidence introduced during the initial sentencing, but the court also defers to the district court's decision to receive additional evidence. *United States* v. *Dickler*,

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[7] Although petitioner is correct that the Ninth Circuit presumptively remands "without limitation on the evidence that the district court may consider," see *Matthews*, 278 F.3d at 885, neither of the Ninth Circuit cases cited by petitioner (see Pet. 9 (citing *United States* v. *Fernandez-Angulo*, 897 F.2d 1514, 1516-1517 (1990) (en banc), and *United States* v. *Gutierrez-Hernandez*, 94 F.3d 582, 585 (1996), cert. denied, 519 U.S. 1084 (1997)) discusses the matter.

64 F.3d 818, 832 (1995) ("where the government has the burden of production and persuasion [for sentencing enhancements,] * * * its case should ordinarily have to stand or fall on the record it makes the first time around," but acknowledging that the district court is in a "far better position" to determine whether circumstances warrant receipt of additional evidence). The D.C. Circuit presumptively limits the receipt of new evidence on remand to that concerning such "new facts as are made newly relevant by the court of appeals' decision" in the case. *United States* v. *Whren*, 111 F.3d 956, 960 (1997), cert. denied, 522 U.S. 1119 (1998).[8]

No court, to our knowledge, has adopted the rule petitioner advocates, which would categorically prohibit receipt of additional evidence on remand when the court of appeals vacates the sentence because of insufficient evidence to support the district court's fact-finding. This Court's review to establish such a rule is not warranted. First, a blanket rule prohibiting receipt of additional evidence would be unsound. Even those courts that presumptively limit the remand to the

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[8] The authorities cited by petitioner (Pet. 9) do not assist him. Although in both *United States* v. *Hudson*, 129 F.3d 994, 995 (1997) (per curiam), and *United States* v. *Monroe*, 978 F.2d 433, 435-436 (1992), the Eighth Circuit remanded for resentencing on the existing record, the court did not purport to establish a general presumption that additional evidence could not be received on remand. Indeed, that court adopted the *opposite* presumption in *Cornelius*, 968 F.2d at 705. There is no question that the court of appeals' remand in this case did not place limits on the district court's ability to receive additional evidence on remand. See Pet. App. A4, B2 (the district court on remand "clearly complied with our earlier mandate"). Thus, petitioner errs in suggesting (Pet. 10-11) that the district court may have violated the "mandate rule," by permitting the government to supplement the record with Agent Barrett's testimony.

initial sentencing record appear to recognize that district courts may receive additional evidence if they determine that circumstances warrant doing so. See, *e.g.*, *United States* v. *Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (suggesting that receipt of additional evidence is appropriate where "special circumstances justif[y]" government's failure to sustain burden of proof); *Dickler*, 64 F.3d at 832 ("we perceive no constitutional or statutory impediment" to permitting the introduction of additional evidence on remand if the government "has tendered a persuasive reason why fairness so requires").

The district court's decision to receive additional evidence was clearly justified by the circumstances of this case and illustrates why a per se rule forbidding the practice would be contrary to the interests of justice. The court of appeals expressed little doubt in its initial opinion that the evidence was sufficient to demonstrate that petitioner was responsible as Thompson's co-conspirator for the sale of numerous kilograms of cocaine. See Pet. App. A2 (noting that "the evidence before the jury (and therefore the district court at sentencing) established that * * * Brownlee employed Thompson as a middleman to distribute kilogram quantities of cocaine" and they "were present at or were directly involved in numerous drug transactions"). In its first opinion, the court of appeals seemed concerned principally with ensuring that the district court had received evidence supporting its specific quantity determination. See *id.* at A5-A6 (emphasizing that "'[m]ultiple kilos' is, obviously, an unspecified amount"). Moreover, the government indicated at petitioner's original sentencing hearing that it was prepared to present the testimony of Agent Barrett (who, two weeks later, testified at Thompson's sentencing on quantity) to establish the

drug quantity the PSR attributed to petitioner or to "fill in [any] gaps" the court saw in the record. 6/3/99 Sent. Tr. 21-22. The district court deemed the evidence adduced at trial sufficient to support the PSR's quantity calculation, however, and declined to hear additional testimony. *Id.* at 26. Thus, the lack of specific support in the record stemmed not from the government's failure to offer proof, but from the district court's decision not to receive the proffered evidence.

Second, it is unclear whether the district court in this case actually relied on the receipt of "new" evidence on remand. As the government noted during the second appeal, Gov't Supp. C.A. Br. 2-3 (*Young II*), the government introduced at trial a tape recording in which Thompson admitted that he had sold Patterson ten kilograms of cocaine on one occasion and that he regularly sold Patterson two kilograms twice a month. See Gov't C.A. Br. 29 (quoting R8:34-37; Gov't Tr. Exh. 10B). Given the frequency with which Thompson sold Patterson drugs, as the district court noted, "there was ample evidence from which to find that [petitioner] was involved in a conspiracy to distribute in excess of 50 kilograms, *and that's just on the trial record.*" 5/2/01 Sent. Tr. 9 (emphasis added).

Finally, it is unclear whether any minor differences in the approaches taken in the courts of appeals on whether receipt of additional evidence is presumptively permitted on remand when the remand order is silent requires this Court's intervention. All courts agree that the remand order can specify whether additional evidence may be taken, and no circuit appears to categorically prohibit the taking of new evidence. In the absence of any pressing need for a uniform national rule on this narrow issue, further review is unwarranted at this time.

2. Petitioner next contends (Pet. 11-15) that the petition should be granted to resolve a disagreement among the lower courts about whether the Due Process Clause requires a sentencing court to employ a heightened standard of proof when its determination of sentencing enhancements may substantially increase a defendant's punishment under the Sentencing Guidelines. This Court has noted that there is "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase [a defendant's] sentence must be based on clear and convincing evidence." *United States* v. *Watts*, 519 U.S. 148, 156 & n.2 (1997) (per curiam); see also *Almendarez-Torres* v. *United States*, 523 U.S. 224, 248 (1998) ("we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence"). Several years ago, the United States filed a petition for a writ of certiorari seeking resolution of that issue. *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999) (seeking review of *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999), cert. denied, 528 U.S. 1163 (2000)).[9] In *Reed*, the court of appeals

[9] The government explained in the petition in *Reed* that there is a conflict between the Ninth Circuit's approach and decisions of the First, Fourth, and Tenth Circuits. See 99-1096 Pet. 14-16 (citing *United States* v. *Lombard*, 102 F.3d 1, 5 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989)). The Sixth Circuit has since joined the majority, concluding that "[a]s long as a sentencing factor does not alter the statutory range of penalties faced by the defendant for the crime of which he was convicted, *McMillan* [v. *Pennsylvania*, 477 U.S. 79, 88 (1986),] permits the factor to be found by preponderance of the evidence." *United States* v. *Gra-*

remanded the case to the district court for resentencing, based on the court of appeals' holding that certain sentencing factors had to be proved by clear and convincing evidence because of their effect on the petitioner's sentence. When the district court reimposed the same sentence on remand after finding the sentencing factors under the heightened standard required by the court of appeals, this Court dismissed the petition for certiorari on the government's motion. *United States* v. *Reed*, 529 U.S. 1063 (2000).

Although this case appears to present the question identified in *Reed*, further review of that question is

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ham, 275 F.3d 490, 518 n.19 (2001), cert. denied, 535 U.S. 1026 (2002). We are aware of no appellate decision outside the Ninth Circuit that has required proof of a sentencing factor (as opposed to a ground for a substantial departure) by more than a preponderance of the evidence.

The other cases cited by petitioner (Pet. 14) do not assist him. *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990), involved a departure from the Sentencing Guidelines rather than the application of a sentencing factor under the Guidelines, and its reasoning ultimately rests on an interpretation of the statute authorizing departures from the Guidelines, not a direct application of the Due Process Clause. See *id.* at 1102; *Watts*, 519 U.S. at 156 n.2 (noting that *Kikumura* did "not reach[] the due process issue"). The Third Circuit has since held that the preponderance standard applies to determinations of drug quantity and confined *Kikumura* to the departure context. See *United States* v. *Paulino*, 996 F.2d 1541, 1545 n.4, certs. denied, 510 U.S. 968 and 1018 (1993). The other cases petitioner cites either note the issue but decline to reach it, *United States* v. *Gigante*, 94 F.3d 53, 56 (2d Cir. 1996), cert. denied, 522 U.S. 868 (1997); *United States* v. *Townley*, 929 F.2d 365, 370 (8th Cir. 1991), or simply state that no such argument could be made on the facts of that case. See *United States* v. *Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994); *United States* v. *Corbin*, 998 F.2d 1377, 1387 (7th Cir. 1993), cert. denied, 510 U.S. 1139 (1994).

unwarranted in this case. Petitioner did not explicitly raise this argument in his initial appeal. Rather, he merely noted that this Court "[s]idestepp[ed] th[e] issue in *Watts*" (Pet. C.A. Br. 25 (*Young I*)) and then argued that the evidence in this case was insufficient to satisfy the preponderance standard. *Id.* at 24-30. Accordingly, under circuit precedent, the issue was not properly preserved when petitioner raised it on his second appeal. See *United States* v. *Escobar-Urrego*, 110 F.3d 1556, 1561 n.5 (11th Cir. 1997); *United States* v. *Fiallo-Jacome*, 874 F.2d 1479, 1481-1483 (11th Cir. 1989). Because of that fact, and because the opinions were unpublished per curiam opinions, the court of appeals did not thoroughly develop and discuss the facts of this case. Cf. *Wills* v. *Texas*, 511 U.S. 1097, 1098 (1994) (O'Connor, J. concurring in denial of certiorari) ("Following this practice [of declining to review claims raised for the first time on rehearing in the court below] makes good sense because we do not have the benefit of a decision analyzing the application of [a constitutional rule] to the facts of petitioner's case.").

There is also no reason to believe the result in this case would have been different had the district court made its quantity determinations using the "clear and convincing evidence" standard. In sentencing petitioner, the district court repeatedly emphasized that the evidence that petitioner participated in the conspiracy with Thompson and Brownlee was "overwhelming" (6/3/99 Sent. Tr. 25), and that there was "ample, ample evidence in the record at the trial" (5/2/01 Sent. Tr. 10) and at sentencing "from which to find that [petitioner] was involved in a conspiracy to distribute in excess of 50 kilograms." *Id.* at 9; accord *id.* at 11 ("on the record that's in front of me now, it seems to me that it's inescapable" that petitioner was responsible for more

than 50 kilograms). The evidence supporting that conclusion included (1) Thompson's exchange of packages with petitioner minutes before petitioner sold heroin to Johnson, Gov't C.A. Br. 31; 3/17/99 Trial Tr. 59-64; (2) petitioner's and Brownlee's intimidation of Johnson after they discovered that Thompson had mistakenly given her more cocaine than she had purchased, Gov't C.A. Br. 8; 3/19/99 Trial Tr. 340-346; 3/22/99 Trial Tr. 496-498; (3) petitioner's relationship with Patterson, who accompanied petitioner once to distribute heroin and to return $17,000 in proceeds to Brownlee, and whom petitioner offered to sell 75 kilograms of cocaine, 5/2/01 Sent. Tr. 72; (4) petitioner's presence at the July 1994 meeting where Thompson agreed to sell Patterson cocaine on a regular basis, *United States* v. *Thompson*, No. 97-662-CR-KMM, 6/18/99 Sent. Tr. 21-22;[10] see also 5/2/01 Sent. Tr. 11 (introducing transcript of *Thompson* sentencing into record in petitioner's case); and (5) Patterson's and Thompson's description of petitioner as an enforcer for the Brownlee organization, 5/2/01 Sent. Tr. 72-73, 80-81. There is thus no reason to conclude that the standard of proof necessary to establish petitioner's relevant conduct had an effect on petitioner's sentence.

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[10] Although petitioner emphasizes that neither he nor his counsel was present at Thompson's June 18, 1999, sentencing hearing to cross-examine Agent Barrett, see Pet. 5, 7-8, counsel was permitted to cross-examine Barrett extensively on remand, before Thompson's sentencing transcript was received into the record. See generally Sentencing Guidelines § 6A1.3(a) (permitting receipt of hearsay evidence so long as "the information has sufficient indicia of reliability to support its probable accuracy").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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